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No. 98-1998

# In the Supreme Court of the United States

KENNETH WITHROW AND FRANKLIN WITHROW,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner Kenneth Withrow lacks standing to challenge the forfeiture of the defendant real property because he is not the true owner of the property.

2. Whether the forfeiture of the defendant real property, which petitioner Franklin Withrow used to facilitate the illegal manufacture of marijuana, violates the Excessive Fines Clause of the Eighth Amendment.

3. Whether petitioner Franklin Withrow's marijuana offense is punishable by more than one year's imprisonment.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 117 F.3d 1433 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on June 16, 1997. A petition for rehearing was granted in part and denied in part on March 10, 1999 (Pet. App. 50a-51a). The petition for a writ of certiorari was filed on June 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

In this civil in rem proceeding, the United States sought the forfeiture of a parcel of real property that it alleged was used by petitioner Franklin Withrow to

commit or to facilitate the illegal manufacture of marijuana. Following a bench trial, the district court ordered the forfeiture of the defendant property. Pet. App. 20a-49a. The district court denied petitioners' motion for reconsideration (*id.* at 3a-17a) and ordered the United States to receive the forfeited property (*id.* at 18a-19a). The court of appeals affirmed. *Id.* at 1a-2a. Nearly two years later, the court of appeals granted a petition for rehearing in part and denied it in part. *Id.* at 50a-51a.

1. On November 17, 1993, the United States filed a verified complaint for the forfeiture of approximately five acres of real property, pursuant to 21 U.S.C. 881(a)(7). Pet. App. 21a, 24a. Meanwhile, on approximately the same date, a Georgia grand jury indicted petitioner Franklin Withrow for unlawfully manufacturing marijuana and unlawfully possessing marijuana. *Id.* at 27a. Franklin Withrow pleaded guilty to the possession charge and was incarcerated for nine months. *Ibid.*

The federal forfeiture complaint alleged that petitioner Franklin Withrow used the defendant property to facilitate his manufacture of marijuana. Pet. App. 24a; C.A. App. Tab 1. In particular, the complaint alleged that surveillance film showed Franklin Withrow fertilizing and harvesting marijuana near his residence on the defendant property. Compl. para. 9; C.A. App. Tab 1, at 4. The complaint further alleged that, during the execution of a search warrant at Franklin Withrow's residence, agents seized marijuana plants, layers of drying marijuana, and plastic bags of marijuana, as well as tools and fertilizer used in the cultivation of marijuana. Compl. para. 12; C.A. App. Tab 1, at 4-5.

2. a. Following a bench trial, the district court concluded that the defendant property should be forfeited. The court's forfeiture order, filed on June 6, 1996, contained detailed findings of fact and conclusions of law. Pet. App. 20a-49a.

Initially, the court addressed the related questions of who owned the defendant property and who has standing to contest the forfeiture. The court found that, although the property was titled in the name of petitioner Kenneth Withrow, who is petitioner Franklin Withrow's father, Kenneth Withrow never exercised any dominion or control over the property. Pet. App. 25a, 36a. Kenneth Withrow never lived on the property, the court found, and Franklin Withrow lived on the property since 1981 without paying any rent to Kenneth Withrow. *Id.* at 26a-27a, 35a, 39a. Moreover, Franklin Withrow paid for the utilities on the property, purchased homeowner's insurance for the property, filed insurance claims in connection with the property, and held himself out to the world as owner of the property. *Id.* at 26a, 28a-30a, 36a, 40a. The court explained that, under Georgia law, Franklin Withrow became the owner of the property by gift after seven years of exclusive possession without paying rent to his father. *Id.* at 41a (citing Ga. Code Ann. § 44-5-85 (Michie 1991) and Georgia case law). The court therefore concluded that Kenneth Withrow lacks standing to contest the forfeiture. *Id.* at 42a. Rather, the court concluded, "Franklin Withrow is in fact the true owner of the defendant property and has standing in that capacity" to challenge the forfeiture. *Id.* at 48a.

Turning to the merits, the district court found that "Franklin Withrow used the defendant real property to facilitate his manufacture of marijuana." Pet. App. 24a. The court elaborated that "Franklin Withrow grew

marijuana on the defendant property and openly stored and dried marijuana throughout the house on the defendant property—even hanging it from a mounted deer head in the living room." *Id.* at 40a. The court noted that the government's evidence supporting "probable cause to believe the defendant real property was used or intended to be used to facilitate the manufacture, sale and/or distribution of marijuana" was "unrebutted," and it concluded that the property was subject to forfeiture under Section 881(a)(7). *Id.* at 48a. The court therefore held that the property "shall be forfeited to the United States unless claimant can prevail upon his [excessive fines] claim," on which the court requested further briefing. *Id.* at 49a. See also *id.* at 4a n.1 (explaining that the court had erroneously referred to a "double jeopardy" claim but had meant an "excessive fines" claim).

b. On September 20, 1996, the district court denied petitioners' motion for reconsideration. Pet. App. 3a-7a, 16a-17a. Petitioners contended that the real property was not subject to forfeiture under Section 881(a)(7) because Franklin Withrow's marijuana offense is not "punishable by more than one year's imprisonment." *Id.* at 5a. The district court explained that, under 21 U.S.C. 841(b)(1)(D), the manufacture of less than 50 kilograms of marijuana is punishable by "a term of imprisonment of not more than 5 years." Pet. App. 6a. The court further noted that, under the Sentencing Guidelines, manufacture of even small amounts of marijuana can result in a sentence of more than one year, depending on such factors as the defendant's criminal history. *Id.* at 6a-7a. And, finding that Franklin Withrow "manufactured 22.9 ounces or some 649 grams of marijuana in 1993," the court determined that, even if it were to look to "the actual sentencing guide-

line range" that would be applicable to Franklin Withrow rather than to the statutory range, his offense would still be "'punishable' by more than one year in prison." *Id.* at 7a.

c. In the September 20, 1996, order, the district court also rejected petitioners' claim that the forfeiture was an excessive fine. Pet. App. 8a-17a. The court recognized that the determination whether the fine was "excessive" required it to consider whether "the severity of the fine" was "proportional[ ]" to "the seriousness of the underlying offense." *Id.* at 14a. The court found that the defendant property had "a fair market value of $121,000." *Id.* at 8a. Although the "street market value" of the marijuana seized from Franklin Withrow's house was only $3500 (*id.* at 12a), the court concluded that "manufacture of 22.9 ounces of marijuana was sufficiently serious, in and of itself, to warrant the instant forfeiture." *Id.* at 15a. In that regard, the court noted that the federal statute prohibiting the manufacture of controlled substances authorizes a fine of up to $250,000 for the manufacture of that amount of marijuana. *Ibid.* See 21 U.S.C. 841(b)(1)(D). Moreover, the court concluded that, because petitioner Franklin Withrow "manufactured marijuana with the intent to distribute it," he is "the most culpable of all types of drug offenders." Pet. App. 14a; see also *id.* at 9a, 11a-12a.

The district court added that "the obvious sophistication" of Franklin Withrow's "manufacturing techniques supports the inference that he was an experienced marijuana grower." The court also noted that Franklin Withrow had manufactured marijuana in 1989, as well as in 1993. Pet. App. 15a-16a. Consequently, the court reasoned, Franklin Withrow "posed a greater danger to society than someone who had merely grown one batch of marijuana." *Id.* at 16a. Thus, the court concluded

that the forfeiture of his property "valued at $121,000" was "not an excessive fine." *Ibid.*

3. On June 16, 1997, the court of appeals affirmed in an unpublished order. Pet. App. 1a-2a. Petitioners filed a petition for rehearing. On March 10, 1999, the court of appeals granted the petition "as to the question of whether the seizure of the property at issue violated the Fifth Amendment Due Process Clause, and, if so, whether as a result of the seizure the appellants were deprived of rents they would have received from their property." *Id.* at 51a. The court of appeals remanded for reconsideration in light of *United States* v. *408 Peyton Road*, 162 F.3d 644 (11th Cir. 1998) (en banc), cert. denied, 119 S. Ct. 1500 (1999). Pet. App. 50a-51a. In all other respects, the court of appeals denied the petition for rehearing. *Id.* at 51a.

**ARGUMENT**

1. Petitioners contend that the decisions of the district court and the court of appeals that Kenneth Withrow lacks standing to contest the forfeiture of the real property "conflict with the United States Constitution, Article III and the court of appeals' other decisions regarding what constitutes standing to assert an innocent owner defense to forfeiture." Pet. 10. That contention lacks merit.

The district court, affirmed by the court of appeals, correctly held that Kenneth Withrow lacks standing to contest the forfeiture. The district court held that, under Georgia law as applied to the facts of this case, Franklin Withrow became the owner of the property after seven years of exclusive possession without paying rent to his father. Pet. App. 41a. Moreover, the court found that Kenneth Withrow "never exercised any dominion or control over the defendant property."

*Id.* at 36a. "[P]ossession of bare legal title by one who does not exercise dominion and control over the property is insufficient to establish standing to challenge a forfeiture" under 21 U.S.C. 881. *United States* v. *Real Property and Improvements Located at 5000 Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991); accord *United States* v. *526 Liscum Drive*, 866 F.2d 213, 217 (6th Cir. 1988); *United States* v. *One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27, 28-29 (8th Cir. 1979), cert. denied, 454 U.S. 1143 (1982). See Pet. App. 36a-37a (explaining that claimant must establish both Article III and statutory standing), 38a (citing cases requiring the exercise of dominion and control for statutory standing).

Petitioners' suggestion (Pet. 10) that the decisions in this case conflict with the court of appeals' prior decision in *Palmetto Drive* is incorrect. Although the court of appeals upheld the standing of the legal title holder in *Palmetto Drive* to contest the forfeiture in that case, the different outcomes in the two cases reflect differences in "the testimony presented and the district court's findings of fact," 928 F.2d at 375. In *Palmetto Drive*, the court of appeals was "not inclined to disturb" the district court's decision that the title holder retained dominion and control over the property but had agreed to allow her son to live on the property free of rent until she retired provided he paid the bills and did nothing illegal on the premises. *Ibid.* In the instant case, the court of appeals affirmed the district court's decision that petitioner Kenneth Withrow never exercised dominion and control over the property and that he "gave the defendant property to Franklin Withrow." Pet. App. 36a; see also *id.* at 41a. That fact-bound determination, based on Georgia law, does not warrant review by this Court. Moreover, if any

inconsistency did exist between the decision of the Eleventh Circuit in this case and its decision in *Palmetto Drive*, that inconsistency should be resolved by the court of appeals rather than this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

2. Petitioners also contend (Pet. 8-9) that the forfeiture of the defendant property is an "excessive fine" under the Eighth Amendment. Relying on *United States* v. *Bajakajian*, 524 U.S. 321 (1998), petitioners compare the value of the marijuana found at the defendant property on the date the search warrant was executed ($3500) with the value of the forfeited real property ($121,000) and conclude that the forfeiture was "clearly excessive." Pet. 8. That conclusion is incorrect.

The district court, affirmed by the court of appeals, correctly held that the forfeiture in this case does not violate the Eighth Amendment. The district court recognized that the appropriate inquiry under the Amendment's Excessive Fines Clause is whether the fine is "excessive" considering the "proportionality" of "the severity of the fine" and "the seriousness of the underlying offense." Pet. App. 13a-14a; accord *Bajakajian*, 524 U.S. at 334 ("a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense"); see *Austin* v. *United States*, 509 U.S. 602, 604 (1993) (forfeiture under Section 881(a)(7) is subject to the limitations of the Excessive Fines Clause).

Assessing the gravity of the offense, the district court found that petitioner "Franklin Withrow used the defendant real property to facilitate his manufacture and distribution of marijuana." Pet. App. 13a. In the district court's view, commission of that crime made

him "the most culpable of all types of drug offenders," because the crime consisted of making *and* marketing the drugs. *Id.* at 14a. Taking into account that the street value of the marijuana at issue in this case is approximately $3500 (*id.* at 12a) and the value of the forfeited property is $121,000 (*id.* at 8a), the district court concluded that "manufacture of 22.9 ounces of marijuana [is] sufficiently serious, in and of itself, to warrant the instant forfeiture." *Id.* at 15a. That case-specific determination is consistent with determinations in similar cases and does not warrant this Court's review. See, *e.g.*, *United States* v. *817 N.E. 29th Drive*, 175 F.3d 1304, 1307 (11th Cir. 1999) (upholding forfeiture under Section 881(a)(7) "of property valued at nearly $70,000 for drug sales totaling only $3,250"); *United States* v. *Real Property Known as 415 East Mitchell Avenue*, 149 F.3d 472, 477 (6th Cir. 1998) (upholding forfeiture under Section 881(a)(7) of home valued at $220,000 in connection with marijuana offenses involving "approximately $20,000 worth of contraband").

Petitioners incorrectly suggest (Pet. 8-9) that the decision in this case is inconsistent with this Court's decision in *Bajakajian*, which held that the forfeiture of $357,144 in cash was "grossly disproportional" to the respondent's crime of failing to report that he was transporting more than $10,000 out of the country (see 31 U.S.C. 5316(a)(1)(A)) and therefore violated the Excessive Fines Clause. 524 U.S. at 324. As this Court did in *Bajakajian* (*id.* at 336-337), the district court here compared the severity of the fine with the seriousness of the underlying offense to determine whether they were proportional (Pet. App. 14a). Because the crime here was more serious and the fine less severe than in *Bajakajian*, the district court reached a differ-

ent result. Unlike the crime in *Bajakajian*, which "was solely a reporting offense," 524 U.S. at 337, petitioner Franklin Withrow's crime was a "serious" drug manufacturing offense. See Pet. App. 14a-15a. And, while the harm that the respondent in *Bajakajian* caused was "minimal," 524 U.S. at 339, the district court found that Franklin Withrow is "the most culpable of all types of drug offenders" (Pet. App. 14a) and an "experienced marijuana grower" (*id.* at 15a) who "pose[s] a greater danger to society than someone who had merely grown one batch of marijuana" (*id.* at 16a). Moreover, the value of the forfeited property in *Bajakajian* was nearly three times the value of the forfeited property in this case. Compare 524 U.S. at 324 with Pet. App. 8a. Thus, nothing in *Bajakajian* calls into question the court of appeals' determination (in affirming the district court) that petitioner's fine was proportional to the offense that he committed.

3. Finally, petitioners argue (Pet. 9-10) that the defendant property should not be subject to forfeiture under 21 U.S.C. 881(a)(7) because (they assert) Franklin Withrow's marijuana offenses are not "punishable by more than one year's imprisonment." As the district court correctly determined, there are "several reasons" why petitioners "are incorrect" in claiming that "Franklin Withrow's behavior does not satisfy this prerequisite." Pet. App. 5a.

First, under 21 U.S.C. 841(b)(1)(D), Franklin Withrow's marijuana manufacturing operation would be punishable by a term of imprisonment of up to five years. See Pet. App. 6a. Second, under the Sentencing Guidelines, "manufacturing small amounts of marijuana is 'punishable' by imprisonment for over a year," depending upon such factors as the defendant's criminal history category. See *id.* at 6a-7a. Third, the district

court found that "even were the issue determined by the actual sentencing guideline range assignable to" petitioner Franklin Withrow, his offense would be "'punishable' by more than one year in prison." *Id.* at 7a. The district court found that "Franklin Withrow's conduct in 1993 is actually more serious than it would have been if he was new to the world of illicit drugs and had not previously demonstrated an affinity for marijuana, a willingness to break the law, and a proficiency for doing so." *Id.* at 16a n.6. The fact that petitioner Franklin Withrow actually received a sentence of only nine months' imprisonment on the state charge to which he pleaded guilty does not mean that his marijuana offenses are not "punishable" by more than one year's imprisonment as a matter of federal law.

Petitioners offer no authority that suggests that Franklin Withrow's marijuana offenses are not punishable by more than one year's imprisonment. The only case they cite is *Bajakajian*, which involved a currency reporting violation and a different forfeiture statute. See Pet. 9-10. In any event, the district court's determination, affirmed on appeal, that petitioner Franklin Withrow's crime was punishable by more than one year's imprisonment is a case-specific holding that does not warrant this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999

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